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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 435

GENERAL ELECTRIC CREDIT CORPORATION,
Petitioner,

VERSUS

ERNEST V. NOBLETT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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General Electric Credit Corporation prays that a Writ of Certiorari issue to review the opinions and judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 2 and June 20, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported in 268 F.Supp. 984 (W.D. Okla. 1967) and is printed in Appendix A hereto. The original opinion of the Court of Appeals entered on April 2, 1968, and the Supplemental opinion entered on June 20, 1968, are printed in Appendix B and Appendix C hereto.

JURISDICTION

The original opinion and judgment of the Court of Appeals was entered on April 2, 1968. Rehearing was denied on June 20, 1968. A thirty (30) day order staying the mandate was granted on July 1, 1968, and the time was subsequently enlarged until August 29, 1968, in which to file this petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Does the opinion of the Court of Appeals for the Tenth Circuit conflict with recent decisions rendered by the United States Court of Appeals for the Third Circuit and the Supreme Court of the State of New York, Appellate Division—Fourth Department, thereby necessitating a review by the Supreme Court in order to clarify and preserve the uniform application of the Commercial Code, which is now in effect in 49 states and the District of Columbia?

2. Whether the Court of Appeals for the Tenth Circuit has unduly restricted the scope of Article 9 of the Uniform Commercial Code by construing it in a narrow manner, thereby conflicting with the expressed purpose of the draftsmen of the Code, that it be liberally construed?

3. Does the Rental Agreement, *taken in its entirety*, validly waive defenses as against the assignee pursuant to Article 9-206(1)?

A.) Whether the opinions of the Court of Appeals for the Tenth Circuit ignore entirely the provision in

the lease containing the *unconditional* promise of the Lessee to pay rent to the Lessor or its Order, thereby rendering this contractual provision, which was designed to impart attributes of negotiability to the lease, meaningless?

B.) Whether the opinions of the Court of Appeals for the Tenth Circuit ignore entirely the *second sentence* of the waiver clause whereby ". . . The obligations of the Lessee shall, however, continue in full force and effect," thus rendering that language superfluous contrary to fundamental rules of contract construction?

4. Did the Court of Appeals for the Tenth Circuit err in its application of Massachusetts Law?

STATUTES INVOLVED

The principal statutory provision involved is Section 9-206(1) of the Uniform Commercial Code of Massachusetts. The Appellate Court has inappropriately injected Section 2-210(4). Sections 3-104, 1-102(1), 2-106(1), 9-102 and 9-105(b) are also secondarily applicable for the purposes of clarification. These are reprinted in full in Appendix D.

THE FACTUAL BACKGROUND

For clarification and the convenience of the Court, petitioner is sometimes referred to as assignee and respondent as lessee.

Pursuant to a Rental Lease Agreement dated May 20, 1965, respondent, Ernest V. Noblett, leased eight (8) Bowl-

Mor Automatic Ten Pin Setting Machines from Bowl-Mor Company, Inc., a Delaware corporation (R. 4). According to the terms of the agreement, respondent agreed to commence installment payments for the use of the machines on September 6, 1965.

The Rental Lease Agreement provides, among other things:

> "The Lessor may assign all its rights, title and interest under this lease, including the payments due hereunder, but the Assignee shall not be held responsible for any of the Lessor's obligations. The obligations of the Lessee shall, however, continue in full force and effect."

On May 24, 1965, Bowl-Mor assigned the Rental Lease Agreement to petitioner (R. 7). After making two payments under said agreement, respondent defaulted and on October 5, 1966, petitioner commenced this action.

THE PROCEEDINGS IN THE COURTS BELOW

Petitioner instituted this suit in the United States District Court for the Western District of Oklahoma by complaint seeking the accelerated balance due under the lease, together with interest, attorneys' fees, and costs (R. 1). Jurisdiction of the District Court was based upon diversity of citizenship between the parties; petitioner being a corporation incorporated under the laws of New York and respondent being a citizen of Oklahoma.

On November 15, 1966, respondent answered petitioner's complaint by raising the defense that the machines were not as warranted and represented to him by Bowl-

Mor and that Bowl-Mor had failed to provide "on the job training" or an advertising and sign allowances, thereby amounting to a total failure of consideration (R. 8).

Petitioner filed a motion for summary judgment (R. 11), and attached the affidavit of R. N. Lamy (R. 2), who stated that petitioner took the assignment from Bowl-Mor in good faith and without notice of any claim or defenses which respondent might have against Bowl-Mor.

On July 31, 1967, the Honorable Luther B. Eubanks entered judgment granting petitioner's motion for summary judgment (R. 31-32) and held that the waiver clause in the lease precludes respondent from asserting defenses against the assignee-petitioner which respondent might have been able to allege against the original lessor.

Respondent perfected its appeal to the United States Court of Appeals for the Tenth Circuit. On April 2, 1968, the Court of Appeals reversed and remanded for further proceedings, holding that, as a matter of law, there was no waiver of defenses under Article 9-206(1), but that such a waiver clause was designed to preclude duties of affirmative performance under the Sales Article 2-210(4) of the Uniform Commercial Code.

Petitioner filed a Petition for Rehearing and Application for Oral Argument En Banc, on May 20, 1968, challenging the erroneous presumption by the Court that the language in the lease was intended to relieve obligations imposed under the Article on Sales (2-210) and not to create a waiver of defenses as contemplated under Article 9-206(1) of the Massachusetts Uniform Commercial Code.

The Appellate Court denied the Petition for Rehearing on June 20, 1968, whereupon petitioner was granted an Order to Stay the Mandate to July 30, 1968, and an enlargement of time for 30 days additional in order that this Petition for Writ of Certiorari might be filed on or before August 29, 1968.

REASONS FOR GRANTING THE WRIT

The widespread adoption of the Uniform Commercial Code, containing new language and modern concepts, presents a continuing problem of consistency in judicial decisions. The primary purpose of the Code was to make uniform the statutory law of the several states and the District of Columbia in regulating commercial transactions. It was promulgated by joint action of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and represents one of the greatest achievements of our times as it is now in effect in some 50 jurisdictions.

Uniformity, however, is being destroyed by varying judicial interpretations of the same provision of the Code and by the misapplication of the wrong Article to a particular transaction. In the case of the Negotiable Instruments Law, which was promulgated as a uniform act in 1886, by 1940 there were 30 sections which had divergent meanings in different states because their highest courts had interpreted the sections inharmoniously. It is most important that the experience under the N.I.L. not be repeated under the U.C.C.

Prompted by this exigency, it is incumbent on petitioner to bring to the attention of the Supreme Court of the United States two recent opinions by the United States Court of Appeals for the Tenth Circuit which have seriously imperiled this fundamental purpose and implore clarification. Failure to resolve this anomaly will speed the dilution of the basic philosophies underlying the Commercial Code.

The aforementioned opinions of the Court of Appeals for the Tenth Circuit have narrowly construed a vital section in Article 9 of the Uniform Commercial Code of Massachusetts, thus depriving it of much of its significance and conflicting with the purpose of the draftsmen, that the Code be liberally construed, and that form should not control over substance.

Furthermore, the opinion of the Court of Appeals for the Tenth Circuit denying petitioner's Petition for Rehearing when contrasted with the earlier opinion in this case, leaves wrapped in the mists of uncertainty the applicability of Section 2-210(4) of the Code to an Article 9 transaction involving the assignment of chattel paper (a lease) to a financial institution.

The initial opinion of the Court of Appeals for the Tenth Circuit held ". . . that the intent manifested by the quoted provision of the Lease Agreement was not to waive defenses as allowed by 9-206(1) of the Uniform Commercial Code but to relieve the assignee of the duty of affirmative performance of the lessor's obligations under the lease with reference to an entirely different section of the Code" 2-210(4)! Such a holding is demonstrably erroneous and conflicts with the decision of the United States

Court of Appeals for the Third Circuit in *Advance Printing & Litho Co.* v. *Bentz*, 387 F.2d 952 (1967).

After rendering this initial opinion, the Court denied petitioner's Petition for Rehearing and stated that it ". . . did not refer to Section 2-210(4) to indicate that the 'Sales' provisions of the Code *necessarily* governed secured transactions in the absence of language so providing but rather to demonstrate that waiver of affirmative performance is not the same as waiver of defenses for nonperformance by a party to the original contract." (Emphasis added.) If such language purports to clarify, the noncommital effect of "necessarily" renders the opinion even more uncertain and creates a real and serious danger to assignment financing.

The Application of Article 2-210(4) Is Erroneous

If the Court of Appeals for the Tenth Circuit means to say, even inferentially, that the clause in the Rental Lease was intended to relieve an assignee of the duties of affirmative performance under Section 2-210(4) of the Code, then as previously stated, such a holding is clearly erroneous and conflicts with a decision by the Court of Appeals for the Third Circuit. Such being the case, the desirability of promoting uniform application of the Uniform Commercial Code throughout the states warrants review at this time by the Supreme Court.

Article 2 of the Uniform Commercial Code is entitled "Sales." A sale is defined in Section 2-106 as ". . . the passing of title from the seller to the buyer for a price." As stated in Bunn, Snead and Speidel, *An Introduction to the Uniform Commercial Code* (1964), at page 30:

"There are many business transactions where, by contract, the possession of goods is transferred from the owner to another person for a consideration. Illustrations are a lease of goods, a pledge or a bailment for service. *While these are transactions in goods they are not within the scope of Article 2.* Article 2 covers the business transaction where, by agreement, the ownership of goods, i.e., title, is transferred from a seller to a buyer for a price." (Emphasis added.)

The instrument involved herein was a lease of goods (R. 4). It was not a sale. The lease specifically provides that: ". . . in no event shall it be construed as a Conditional Bill of Sale" (R. 5). Title to the goods did not pass from the lessor (Bowl-Mor) to the lessee (Noblett).

The United States District Court for the Western District of Pennsylvania in *In the Matter of Advance Printing & Litho Co.*, 277 F.Supp. 101 (W.D. Pa. 1967), rejected an argument that a section of Article 2 applied to a security transaction by stating at page 105:

"The Referee in his discussion referred to Pa. Uniform Commercial Code 12 A.P.S. §2-302 relating to unconscionable contracts. This section permits a Court to refuse to enforce such a contract, or in certain situations to limit an unconscionable result. But it is clear that Section 2-102 takes a security transaction without the scope of that article in the Code. Thus, the cited section does not assist the trustee in avoiding payment of the Rosenthal claim."

The Third Circuit affirmed the District Court based ". . . on its well-reasoned opinion." *Advance Printing & Litho Co.* v. *Bentz*, 387 F.2d 952 (3 Cir. 1967).

It should therefore be clear that the instant parties did not need to contract with reference to Section 2-210(4) because Article 2 did not apply. The assignment of the lease from Bowl-Mor to petitioner was a transaction subject to Article 9 since it was an assignment of chattel paper, as defined in Section 9-105(b). See Section 9-102 of the Uniform Commercial Code, which is reprinted in Appendix D.

If, on the other hand, the Court of Appeals for the Tenth Circuit means to say that Section 2-210(4) doesn't "necessarily" govern secured transactions, but was used by analogy to demonstrate that the waiver of affirmative performance is not the same as waiver of defenses for nonperformance, then the Appellate Court has nevertheless misinterpreted Section 2-210(4) in failing to recognize that where a financing assignment is involved, there is no delegation of duties of the assignor.

Section 2-210(4) of the Uniform Commercial Code provides as follows:

> "(4) An assignment of 'the Contract' or of 'all my rights under the contract' or an assignment in similar general terms is an assignment of rights and *unless the language or the circumstances* (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract." (Emphasis added.)

The Lease Agreement expressly provides that it should be ". . . interpreted in accordance with the laws of

the Commonwealth of Massachusetts. . . ." A 1964 decision of Massachusetts' highest Court in *Chatham Pharmaceuticals, Inc.* v. *Angier Chemical Co., Inc., et al.*, 347 Mass. 208, 196 N.E.2d 852, recognized the important distinction between (a) an assignment of rights only and not of obligations; and (b) an assignment of rights and obligations. The Supreme Judicial Court of Massachusetts held that from a consideration of *the circumstances*, the case belonged in the former category, even though the assignment was in general terms and there was no language absolving the assignee of responsibility for the assignor's obligations.

The Official Comment to Section 2-210(4) recognizes the distinction between a commercial assignment and a financing assignment. Official Comment Number 5 states as follows:

> "5. Subsection (4) lays down a general rule of construction distinguishing between a normal commercial assignment, which substitutes the assignee for the assignor both as to rights and duties, and a *financing assignment* in which only the assignor's rights are transferred." (Emphasis added.)

While a commercial assignment would perhaps require express language in order to negate the duty of affirmative performance by the assignee of the assignor's obligations, a financing assignment excludes any contemplation that a financial institution might be held accountable for these affirmative obligations. Hence, no express language is required of a financing agreement in order to preclude the delegation of duties of the assignor.

It appears that the conclusion of the Court of Appeals for the Tenth Circuit that the waiver clause was designed

by the lessor to eliminate such a non-existent duty on the part of the assignee is based upon an unwarranted assumption that the draftsmen of the lease and the parties who signed it were ignorant of the provisions of applicable law. Moreover, to so interpret the waiver clause renders it superfluous and meaningless and violates the basic rule of construction, that all portions of a contract should, if possible, be construed in a manner that would give them effect and render them meaningful.

No clause in the Rental Lease was needed to relieve the assignee (petitioner) of the responsibilities for the assignor's warranties or prospective performance. See the discussion by Professor Grant Gilmore in Volume 2, § 41.5, page 1092, *et seq.* of *Security Interests in Personal Property* (1965), wherein he states:

> "Between buyer and seller's assignee, however, the breach of warranty or failure of consideration is available only defensively; if a buyer wishes to recover his down payment or his damages, he must go directly against his seller. *The assignee, who comes in to finance the transaction, does not thereby become responsible for the assignor's warranties or prospective performance.*" (Emphasis added.)

There Was a Waiver of Defenses Under Section 9-206(1)

Since there was no other reason for putting the provision (waiver clause) in the Rental Lease, the Court should determine that the language of the lease, *taken in its entirety,* was a waiver of defense agreement under Section 9-206(1).

Section 9-206(1) of the Uniform Commercial Code provides as follows:

"9-206 AGREEMENT NOT TO ASSERT DEFENSES AGAINST ASSIGNEE; MODIFICATION OF SALES WARRANTIES WHERE SECURITY AGREEMENT EXISTS.

"(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who, as part of one transaction, signs both a negotiable instrument and a security agreement makes such an agreement."

The language of the Rental Lease (R. 4) contains the *unconditional* promise of the lessee (respondent) to pay rent:

> "The Lessee agrees that the total to be paid as rental under the original term of this lease is ($79,200.00) Dollars, seventy-nine thousand two hundred and no/100 dollars which sum the Lessee *unconditionally* promises to pay in advance to the Lessor or *its order,* at such place as the *Holder* hereof may designate . . ." (Emphasis added.)

This provision is immediately followed in the lease by the waiver of defense clause which provides:

> "The lessor may assign all its rights, title and interest under this lease, including the payments due hereunder, but the assignee shall not be responsible for any of the lessor's obligations. *The obligations of the lessee shall, however, continue in full force and effect.*" (Emphasis added.)

The Court of Appeals for the Tenth Circuit held that respondent merely agreed that he would not endeavor to enforce any obligations against the assignee and that this did not preclude him from asserting defenses against petitioner. Such an interpretation totally ignores the effect of the language of the second sentence in the waiver clause. It is in that sentence of the agreement following his consent and exoneration, that the lessee-respondent agrees, however, that his obligation shall continue in full force and effect. What obligation? The obligation to pay! This is the primary obligation of the lessee under the lease agreement. He reiterated this continuing obligation to make the payments notwithstanding the assignment and exoneration.

How can a lessee maintain that he reserves the right to assert defenses against an assignee when he specifically reiterates his continuing obligation to pay! The language to which respondent agreed simply cannot be anything other than a cut-off of defenses as authorized by Section 9-206(1) of the Uniform Commercial Code.

The Appellate Court seemingly concluded that the interpretation of this clause as a waiver of defense would be unduly harsh to respondent. The hard facts of a particular lessee's position must not become the basis for promulgating a decision which will confuse and confound commercial transactions as to the intent, construction, and application of the Uniform Commercial Code. Disputes between original sellers and buyers, or lessors and lessees, should be settled directly between them and there is no valid consideration of public policy which forbids the assignee in a commercial transaction from acquiring by contract a position free from such disputes.

The opinions of the Court of Appeals for the Tenth Circuit completely disregard previous judicial interpretations of the identical clause in this lease. In *General Electric Credit Corporation v. Brick Plaza Lanes, Inc., et al.*, the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L25891-64, A-18908 (1966), interpreted the lease as containing a valid waiver of defense clause, and a copy of that Court's opinion is attached as Appendix E. The opinions are also at variance with Judge Eubanks' well-reasoned opinion in *General Electric Credit Corporation* v. *Noblett*, 268 F.Supp. 984 (W.D. Okla. 1967). The Appellate Court further disregarded the interpretation of a somewhat similar clause in *Baldino* v. *ABC Appliance Service*, 83 Pa. D & C 305 (Philadelphia County, 1952), which is attached to petitioner's brief as Appendix F. Respondent cited no cases involving similar clauses wherein said clause was not interpreted as a waiver of defense clause.

The purpose of the provision in the lease was to create a waiver of defenses. Another provision in the lease lends further weight to petitioner's position. The lease provides:

> "The Lessee agrees that the total to be paid as rental under the original term of this lease is ($79,200.00) Dollars, seventy-nine thousand two hundred and no/100 dollars which sum the Lessee *unconditionally* promises to pay in advance to the Lessor or *its order*, at such place as the *Holder* hereof may designate . . ." (Emphasis added.)

This provision of the lease was *not considered* in the Appellate Court's opinions. The effect of this provision and the agreement that the assignee shall not be responsible

for any of the lessor's obligations and that the obligations of the lessee shall continue is to create a waiver of defenses under Section 9-206(1).

By *unconditionally* promising to pay the rent to the lessor or holder of the lease, the lessee (respondent) is estopped from now asserting as far as the assignee (petioner) is concerned that such language does not mean what it says, but is conditioned upon the lessor's (Bowi-Mor) performing its obligations under the lease. A financial institution such as petitioner has the right to rely upon the contractual language contained in the lease. Also, the *unconditional* promise of the lessee to pay rent is an independent covenant and is in no way dependent upon the lessor's performing its obligations under the lease.

By failing to recognize this as a true waiver of defense clause the Court of Appeals for the Tenth Circuit has thwarted one of the major purposes of the Uniform Commercial Code, which is to elevate substance over form. No special combination of words should be necessary to bring into operation the waiver provision of Section 9-206(1). The purpose of Section 9-206(1) was to create the same result irrespective of whether a waiver clause was put in the original document between the lessor and lessee or whether the lessee executed a note in connection with the transaction. The Code in this setting was looking past the bare form of the transaction to the realities that surround contemporary commerce and commercial financing.

As is stated by Professor Homer Kripke in the Practice Commentary to McKinney's Consolidated Laws of New York Annotated, § 9-206:

> "The Code's conclusion, except for consumer goods, harmonizes with the Code's regular thrust toward the abolition of formal differences. Obviously, if a bank made a loan with which the borrower bought goods, the borrower could not defend against his loan on the ground that he was not happy with the goods. The use of credit sales by sellers, with the banks almost immediately stepping into the seller's position as to the credit obligations, is simply another legal mechanism which reaches the same ultimate result. Thus, there is little reason for the bank to end up in a more exposed position when it obtains the credit obligation through the seller."

In the present case respondent has made an *unconditional promise to pay*, as in a negotiable instrument. See Section 3-104 of the Uniform Commercial Code. The document has been assigned to petitioner containing a clause absolving the assignee of all responsibility for the lessor's obligations and the lessee has reiterated that his obligations shall continue. Petitioner should be able to rely on these adjoining representations and take free from defenses against the lessor in the same manner as if petitioner had loaned respondent the money to buy the bowling machines and taken a note and security interest in the property. Any other conclusion recognizes form over substance.

There is no reason why the Court should give Section 9-206(1) a narrow, begrudging construction. Rather Section 9-206(1), which applies to assignments of both security agreements and leases, should be liberally construed so as to facilitate the free movement of chattel paper in the commercial world. See Section 1-102(1) of the Uniform Commercial Code.

The Appellate Determination of Intent Is Erroneous

The Court of Appeals for the Tenth Circuit erred in referring to a subsequent document to interpret the meaning of a prior document between different parties.

The original opinion refers to the assignment from Bowl-Mor to appellee (R. 7) in an endeavor to determine the "intent and meaning" of the lease clause involved herein. It is difficult to see why the Appellate Court made such a reference.

There is no need for an assignment to contain an exhaustive summary of the provisions of the lease and the insertion of clauses in this subsequent document cannot affect the earlier one. The clause in the lease must stand or fall on its own wording with reference to the commercial setting in which it was drafted. Resort to this subsequent document by the Appellate Court was improper.

With regard to a determination of the intent of the parties, the Court of Appeals for the Tenth Circuit completely disregards the effect of the second sentence of the waiver clause which states: "The obligations of the Lessee shall, however, continue in full force and effect." The insertion of this particular language in the lease agreement cannot be ignored by an interpretative court and the use of *"however"* in this context must be given recognition. It is respectfully submitted that other interpreters of the Uniform Commercial Code will have a deplorable difficulty in understanding the reason for its inclusion in the rental lease other than to make intentionally specific that the lessee was purposefully clarifying that he was knowingly cutting off the assertion of any of the usual defenses insofar as the financing assignee (petitioner) was concerned.

The primary obligation of the lessee was the unconditional promise to pay rent. By virtue of this contractual sentence and the succeeding one, respondent has agreed that the lease may be assigned, that the assignee shall not be responsible for the obligations of the lessor and that his *unconditional* promise to pay rent shall continue. This has to mean the same thing as saying that the lessee waives any defenses insofar as the assignee is concerned. The failure to recognize this creates a rule of law which requires magic phrases in order to bring Section 9-206(1) into effect, when the reasonable import of the words employed should do so. *The Appellate Court's failure to interpret the contractual clause as a waiver provision is tantamount to making a nullity of the second sentence of the clause.* The opinion renders it absolutely meaningless and violates the fundamental rule of construction that all provisions of a contract should, if possible, be given effect.

Footnote 4 of the Appellate Court's initial opinion raises the further inappropriate suggestion that the fact that this lease is on a printed form of the lessor is relevant to this case. Resolving ambiguities against the drafter can have no relevance, since the drafter (Bowl-Mor) is not a party to this lawsuit. If the language is to be construed against anyone, it should be respondent, who participated in the original transaction and not petitioner, who at a subsequent date took an interest in the lease for value, in good faith and without notice of any claim or defense.

If the Court is unable to render an appropriate interpretation of the waiver provision without treating it as superfluous, then in the interest of justice, fair play, and the future effect of this decision on financing arrange-

ments, the entire matter would be better referred back to the trial court for evidence and determination as to the intent of the parties in this particular transaction. Such was the final conclusion of the Supreme Court of the State of New York, Appellate Division—Fourth Department, attached as Appendix G, in *General Electric Credit Corporation* v. *Ludwig Beyerlein*, — A.D.2d —, involving the identical lease provision, wherein the Appellate Division denied Summary Judgment, but remanded to the trial court to determine the intent of the parties. Rather than treat the language of the lease as superfluous, the very least the Court of Appeals for the Tenth Circuit should have provided is for a fact determination of the parties' intent at the trial level.

The Prediction as to Massachusetts Law Is Erroneous

The Court of Appeals for the Tenth Circuit erred by attempting to predict how a Massachusetts court would interpret the language involved herein. The Appellate Court relied on a case which is patently inapplicable, namely *Quality Finance Company* v. *Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958).

The Appellate Court erred in its reference to the *Hurley* case as setting forth the general policy of Massachusetts on waiver of defense clauses. It should be apparent that *Hurley* is inapplicable because it was a pre-Uniform Commercial Code decision and involved "consumer goods." The initial opinion correctly determined that the bowling machines involved herein were not "consumer goods." The policy espoused in *Hurley* is to be limited to consumer goods cases and its application to the present

case is clearly erroneous. The general policy of Massachusetts regarding waiver of defense clauses in non-consumer transactions is to be found exclusively in the wording of Section 9-206(1) of the Uniform Commercial Code, which was specifically amended by the Massachusetts Legislature in 1963 to make the waiver applicable to a *lessee* and this has been the policy with respect to lease transactions since that time.

Since the decision by the Court of Appeals for the Tenth Circuit denying appellee's Petition for Rehearing, the Supreme Court of the State of New York, Appellate Division—Fourth Department in *General Electric Credit Corporation* v. *Ludwig Beyerlein, supra,* has unanimously rejected the reliance on *Quality Finance Co.* v. *Hurley, supra,* as creating an exception to 9-206(1). The Appellate Division said: "Since the personal property in question is not consumer goods, the reliance of the Court below on Quality Finance Co. v. Hurley (supra) as creating an exception to Section 9-206 of the Massachusetts Uniform Commercial Code was mistaken." This decision of the Appellate Division does support petitioner's contention that other courts are arriving at results contrary to the opinion of the Court of Appeals for the Tenth Circuit involving the same situation. In the interests of preserving the uniform application of the Uniform Commercial Code, the Supreme Court of the United States will eventually have to resolve the issue.

CONCLUSION

Consistent with the argument that has gone before, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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